No. 80-5116

IN THE

Supreme Court of the United States

October Term 1980

DANE LAMAR JENKINS

Petitioner.

v.

LOU BREWER, WARDEN

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. AND THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK

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The Recently Passed Civil Rights of Institutionalized Person Act, 42 U.S.C. § 1997 et seq., with Its Carefully Crafted Administrative Exhaustion Requirement, Is Fully Applicable to This Case. Appropriate Deference to Congressional Intent Precludes the Judicial Imposition of a Different or More Burdensome Exhaustion Requirement Such As the One Imposed by the Court Below. 9

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The National Prison Project of the American Civil Liberties Union Foundation, Inc. and the Legal Aid Society of the City of New York respectfully move this Court for leave to file a brief *amicus curiae* in this case. We make this motion subsequent to seeking consent from Respondent's attorneys. By letter dated November 25, 1980 such consent was refused.

Identification and Interest of Amici

The National Prison Project is a tax-exempt foundation funded special project of the American Civil Liberties

Union Foundation, Inc. which seeks to enforce and broaden the rights of prisoners to American prisons and jails by utilizing existing administrative, legislative and judicial channels. Established in 1972, the National Prison Project has represented prisoners' interests in federal and state courts and before the Congress and state legislative bodies across the nation. Most recently we appeared before this Court as *amicus* in *Carlson* v. *Green,* 446 U.S. 14 (1980). Since the founding of the Project we have consistently opposed the adoption of a administrative exhaustion requirement in prisoner cases. In connection with this position, we participated in the legislative process which eventually led to the 1980 enactment by Congress of § 7 of the Civil Rights of Institutionalized Persons Act (codified at 42 U.S.C. § 1997e). The safeguards for prisoners contained in this provision are the results of the efforts of prisoner rights advocates and organizations including the Prison Project. Our interest in filing this motion and brief is to make the Court aware of the applicability of this statute in the circumstances of this case.

The Legal Aid Society of the City of New York is a private organization which serves the legal needs of the poor in many ways including prisoners. The Society is greatly concerned with maintaining individuals access to federal courts to remedy violations of their constitutional rights.

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Statement of Facts

The Petitioner Dane Lamar Jenkins is a prisoner confined to the Illinois state penitentiary at Joliet (Statesville) to serve his sentence. Pursuant to 42 U.S.C. § 1983 Jenkins *pro se* brought a lawsuit alleging that certain personal property with a monetary value of $851.29 and legal materials were confiscated and not returned by the Statesville prison authorities in violation of his rights under the Due Process clause of the Fourteenth Amendment. The District Court dismissed the action on the grounds that petitioner failed to utilize available ad—

ministrative remedies; exhaustion of such remedies was required under a recent Seventh Circuit decision in *Secret* v. *Brierton,* 584 F.2d 823 (7th Cir. 1978). Before the Court of Appeals affirmed the dismissal of Petitioner's action, Congress enacted the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247 § 7, 94 Stat. 352, 42 U.S.C. § 1997e (Supp. 1980) containing an exhaustion requirement applicable to prisoner cases. Thereafter Petitioner filed his petition for the writ of certiorari. Such writ was granted on November 10, 1980 and counsel appointed on November 17, 1980.

Relevant Statutory Provision

Title 42 U.S.C. § 1997e

Exhaustion of remedies—
Applicability of administrative remedies

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crimen confined in any jail, prision, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards

(b)(1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prision, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

Procedure for review and certification of systems for resolution of grievances of confined adults for determination of compliance with minimum standards; suspension or withdrawal of certification for noncompliance; development, etc., by Attorney General

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

Failure of State to adopt or adhere to administrative grievance procedure

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997a or 1997c of this title.
Pub.L.96–247, § 7, May 23, 1980, 94 Stat. 352.

Summary of Argument

After the decision of the District Court, but before the judgment of the Court of Appeals dismissing this civil rights action, Congress enacted a carefully crafted statute setting forth the narrow conditions under which courts were a authorized to require exhaustion in civil rights cases brought by institutionalized persons convicted of crime. Because the question whether exhaustion is required in a § 1983 action is one of legislative intent, and because legislative intent as expressed in the new statute demonstrates that the exhaustion requirement upheld by the Seventh Circuit is inconsistent with the will of Congress, the judgment below must be reversed, and the case remanded to the District Court for proceedings not inconsistent with the statute.

ARGUMENT

THE RECENTLY PASSED CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT, 42 U.S.C. § 1997 et seq., WITH ITS CAREFULLY CRAFTED ADMINISTRATIVE EXHAUSTION REQUIREMENT, IS FULLY APPLICABLE TO THIS CASE. APPROPRIATE DEFERENCE TO CONGRESSIONAL INTENT PRECLUDES THE JUDICIAL IMPOSITION OF A DIFFERENT OR MORE BURDENSOME EXHAUSTION REQUIREMENT SUCH AS THE ONE IMPOSED BY THE COURT BELOW.

A. The Non-Exhaustion Rule and Its Basis

Since 1963, this Court has consistently rejected the notion that state administrative remedies must first be exhausted in order for a plaintiff to invoke the remedy provided by 42 U.S.C. § 1983. *Allen v. McCurry* ____ U.S. ____, U.S.L.W. 4015, 4019, n. 24 (December 9, 1980); *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975) (dictum); *Carter v. Stanton*, 405 U.S. 669 (1972); *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971); *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *King* v. *Smith*, 392 U.S. 309, 312 n.4 (1968); *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).[1] This rule of non-exhaustion has been applied in cases involving prisoners *(Wilwording, Houghton)* as well as in cases in-

[1]The Court of Appeals conceded in promulgating its exhaustion rule that there was no direct support for its holding in this Court's § 1983 exhaustion cases. *Secret* v. *Brierton*, 584 F.2d at 828.

volving welfare recipients *(Carter, Damico)*, students *(McNeese)*, and other civil rights plaintiffs.[2]

In construing 42 U.S.C. § 1983 as not requiring prior administration exhaustion, the Court necessarily relied on the purpose and intent of the statute. Thus, the *McNeese* holding was explicitly based on the Court's prior review of the history and purpose of § 1983. *McNeese*, 373 U.S. at 671-674, relying on *Monroe* v. *Pape*, 365 U.S. 167 (1961). This adherence to the intent of Congress was underscored by the Court in its single qualification of the rule of non-exhaustion. In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), the Court held that an action seeking restoration of prisoners' "good time," though appropriately brought under the literal terms of § 1983, must instead be brought under the more specifically applicable habeas corpus statute with its attendant judicial exhaustion requirement. The Court distinguished the *Monroe/McNeese* line of non-exhaustion holdings on the ground that different legislative intentions governed § 1983 and federal habeas corpus.

> . . . [I]n those cases, brought pursuant to § 1983 no other, more specific federal statute was involved that might have reflected a different congressional intent. In the present case, however,the respondents' actions fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific

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[2]On the one recent occasion where the Court granted certiorari in a case presenting an opportunity for reconsideration of the non-exhaustion rule, the Court dismissed the writ as improvidently granted, with a suggestion by one Justice that the state of the law was sufficiently clear as to require no opinion by the Court. *Burrell* v. *McCray*, 423 U.S. 471 472-73 (1976). (Stevens, J., concurring).

> determination in § 2254(b) that requiring the exhaustion of adequate state remedies in such cases will serve the policies of federalism. *Preiser*, 411 U.S. at 492 n. 10.[3]

See also *Allen v. McCurry* ____ US ____, 49 U.S.L.W. at 4919 n.24 (cites lack of exhaustion requirement under § 1983 as demonstrating "continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for § 1983 violations").

The Court's understanding of congressional intent reflected in its long string of non-exhaustion holdings was amply supported not only by *stare decisis* but also by the failure of Congress for almost twenty years to disturb these holdings. Compare *Maine v. Thiboutot* ____ U.S. ____, 48 U.S.L.W. 4859, 4861 (June 25, 1980) *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1070). The significance of this failure to act is underscored by Congress' response in an analogous situation to a judicial ruling regarding exhaustion. In light of *Fay* v. *Noia*, 372 U.S. 391 (1963), Congress amended 28 U.S.C. §§ 2254 and 2255 to guide the courts in habeas corpus proceedings. Congress has also explicitly exacted exhaustion of remedies provisions in other areas of the law, e.g., the collection of state taxes (28 U.S.C. § 1341) and state utility rate orders (28 U.S.C. § 1342). In light of these explicit exhaustion requirements, Congress' failure to promulgate a similar requirement under § 1983 is further evidence that no such requirement was intended. See *Carlson* v. *Green*, 446 US 14, 20 (1980).

[3]This passage in *Preiser* apparently escaped the notice of the Seventh Circuit, which, in promulgating its exhaustion requirement, cited the habeas corpus exhaustion requirement as evidence that exhaustion was not inconsistent with the intent of § 1983. *Secret* v. *Brierton*, 584 F.2d at 830-31.

B. The Civil Rights of Institutionalized Persons Act

Congress has now passed legislation specifically establishing and defining a carefully limited exhaustion requirement in § 1983 cases brought by state prisoners. This requirement differs from the Seventh Circuit exhaustion rule in several highly important respects. This new exhaustion provision must be deemed the controlling indication of Congressional intent. The courts may not judicially amend the recent legislation by promulgating additional or different requirements for administrative exhaustion. This conclusion, compelling on its face, is further supported by examination of the legislative history, which shows that the statute's exhaustion requirement developed over time as part of a carefully considered and balanced adjustment of Congress' remedial scheme for the protection of civil rights.

On May 23, 1980, Congress passed the Civil Rights of Institutionalized Persons Act ("the Act"). Pub. L. 96-247, 94 Stat. 349 *et seq.* (codified at 42 U.S.C. §§ 1997-1997j [Supp. 1980]). This statute accomplished two purposes: it established and defined the authority of the Attorney General to commence or to intervene in actions seeking to protect the civil rights of persons held in state institutions (including mental institutions, jails and prisons, juvenile facilities and nursing homes), 42 U.S.C. §§ 1997a-d, f-j, and it established a narrow and limited administrative exhaustion requirement for § 1983 cases brought by adult prisoners. 42 U.S.C. § 1997e.

Earlier bills proposing a broader exhaustion requirement were not enacted. For example, H.R. 12008, 94th Cong. 2d Sess. (1976) provided in part:

> Relief shall not be granted by a district court in an action brought pursuant to Section 1979 of

> the Revised Statutes (42 U.S.C. § 1983) by an individual involuntarily confined in any State institution alleging deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available: *Provided*, That, exhaustion shall not be required if it appears that there exist circumstances rendering such administrative remedy ineffective to protect his rights. *Id.* at §4 (emphasis in original).

The same provisions were included in a virtually identical bill introduced in the same session, H.R. 12230, 94th Cong., 2d Sess. (1976). The exhaustion requirement of these bills applied to all persons involuntarily confined in state institutions. The terms "plain, speedy, and efficient" were not elaborated upon or defined. There was no indication in the bills what circumstances might "render such administrative remedy ineffective" or what "ineffective" meant. The bills appeared to treat exhaustion as a jurisdictional requirement whose absence would justify dismissal of the action.

In the next Congress, these bills were reintroduced as H.R. 5791, 95th Cong., 1st Sess (1977), with identical exhaustion provisions. In the same session, H.R. 2439, was also introduced; it contained provisions similar to those of H.R. 5791 and its predecesors as to the Attorney General's involvement in institutional litigation, but contained no provisions for administrative exhaustion. However, a third bill was introduced in this session, H.R. 9400, 95th Cong., 1st Sess. (1977), which the included the first appearance of an exhaustion requirement in a form similar to that which was ultimately passed. This section of the bill provided:

haustion requirement in a form similar to that which was ultimately passed. This section of the bill provided:

> In any action brought pursuant to section 1979 of the Revised Statutes (42 U.S.C. § 1983) by an adult individual confined in any jail, prision, or other correctional or pretrial detention facility, the court may continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in the interest of justice: *Provided*, that such exhaustion shall not be required unless the Attorney General has certified that such administrative remedy meets the minimum acceptable standards promulgated pursuant to this section. *Id.* at § 5(c) (emphasis in original)

The preceding parts of the quoted section required the Attorney General, "after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections," to promulgate minimum standards for grievance resolution systems for jails and prisons, consistent with certain specific requirements in the statute. The Attorney General was also directed to develop a procedure for review and certification of grievance systems to determine if they met these minimum standards. *Id.* at § 5(b, c).

Thus, in H.R. 9400, the focus of the proposed exhaustion requirement had been narrowed to adults confined in prisons, jails and pre-trial detention facilities. Although the terms "plain, speedy, and effective" were not defined in the bill, the exhaustion requirement was limited to cases

in which the Attorney General had promulgated standards meeting certain statutory requirements and had certified the administrative remedy in question as meeting those standards. The prior language that "[r]elief shall not be granted" unless remedies had been exhausted, H.R. 12008 at § 4, was replaced by a provision for a stay of no more than 90 days, giving the plaintiff clear recourse in the event of administrative delay and giving further content to the word "speedy." Finally, application of the exhaustion requirement was made contingent on a finding by the court that it was "appropriate and in the interest of justice," giving the courts leeway to deal with the facts of particular cases (e.g., a dispute over medical treatment of an arguably emergency nature).

In 1979, substantially similar legislation was introduced as H.R. 10, 96th Cong., 1st Sess. (1979). Several minor modifications were made in the exhaustion provisions. The language of H.R. 10 permitted exhaustion to be required if the "Attorney General has certified *or the court has determined* that such administrative remedy is in substantial compliance, with the minimum acceptable standards promulgated pursuant to this section." H.R. 10 at § 4 (c) (emphasis added). The Attorney General was given a deadline of 180 days after the passage of the bill to promulgate minimum standards; these standards were to be submitted for publication in the Federal Register and were to take effect after publication unless either House of Congress adopted a resolution of disapproval. *Id.* at § 4(a).

H.R. 10 was ultimately passed and signed into law on May 23, 1980, after some further amendment and after referral to a conference committee to resolve differences between the House and Senate versions of the legislation.

H.R. Report 96-897, 96th Cong., 2d Sess. at 1.[4] The exhaustion provisions of the bill as enacted were substantially identical to those initially proposed in H.R. 10 except for some minor changes in wording, the elimination of pre-trial detainees from the exhaustion requirement, and a statement that a state's failure to adopt a grievance procedure consistent with the above described provisions would not constitute a basis for a separate lawsuit.

Review of this series of legislative proposals and the statute that ultimately emerged reveals Congress' attempt to strike a balance among the needs of prisoners for protection of their constitutional rights, the needs of courts for relief from the management problems caused by prision litigation (primarily *pro se* petitions by uncounselled inmates), and the desirability of having disputes resolved "in-house" without resort to litigation. The salient features of the balance finally struck are as follows.

1. An exhaustion requirement for prisoner suits was linked with establishment of fair and effective grievance mechanisms. If prision authorities seek the benefits of the Act's exhaustion requirement, they must provide remedies whose exhaustion provides some prospect of a fair resolution of the controversy, as determined by the Attorney

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[4]In the Senate, several bills were introduced authorizing the Attorney General's involvement in institutional litigation but containing no exhaustion requirement. S.1393, 95th Cong., 1st Sess. (1977); S.10, 96th Cong., 1st Sess. (1979); see S.Rep. 96-416, 96th Cong., 1st Sess. (1979) at 9. An exhaustion requirement substantially identical to the provision ultimately enacted was added to S.10 before that bill was reported favorably by the Committee on the Judiciary. S.10, 96th Cong., 1st Sess., S.Rep. 96-416 (1979) at 34.

General or by the court.[5] The seriousness with which Congress views this linkage is indicated by the Conference Report's structure that "It is the intent of Congress that the phrase 'in substantial compliance with' means that there be no omission of any essential part from compliance, that any omission from compliance consists only of unimportant defects or omissions, and that there has been a firm effort to fully comply with the standards." H.R. Report 96-897 at 17.

2. Specific requirements for the minimum standards are to be promulgated by the Attorney General. The standards must provide:

> (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible) in the formulation, implementation and operation of the system.
>
> (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
>
> (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
>
> (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

[5]The provision permitting the court to find that a grievance procedure substantially complies with the Attorney General's minimum standards is intended for cases where the Attorney General's certification has not been sought or is pending, and not to permit the courts to overrule the Attorney General's determination. H.R. Report 96-897 at 17.

> (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution. 42 U.S.C. § 1997e(b)(2)[6]

These requirements are explicitly derived from the California Youth Authority grievance procedure, a system which has been in operation since 1973 and which has a national reputation for success in resolving disputes. H.R. Rep. 96-80, 96th Cong., 1st Sess. (1979) at 23; see also William Bennett Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts", 92 Harv. L. Rev. 610, 642 (1979). Congress has thus adopted a "working model" of a fair and effective grievance procedure, and conformity to these tested principles is intended to be a prerequisite for application of the Act's exhaustion requirement.

3. The exhaustion requirement is discretionary, not mandatory or jurisdictional; in order to apply it,

> . . . the court must find that it would be "appropriate and in the interests of justice."
>
> It is the intent of Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to 42 U.S.C. § 1983 raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system. . . . H.R. Rep. 96-897 at 15 (Conference Report).

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[6]The Attorney General has, pursuant to the statute promulgated proposed minimum standards. Department of Justice, Office of the Attorney General, "Standards for Inmate Grievance Procedures," 45 F.R. 79095 (November 28, 1980).

This requirement that the court affirmatively find exhaustion "appropriate and in the interests of justice" represents a significant shift in the burden of persuasion from the provision of H.R. 12008 that "exhaustion shall not be required if it appears that there exist circumstances rendering such administrative remedy ineffective to protect (plaintiff's) rights." Such a shift is especially appropriate because many prisoner litigants must proceed *pro se* and are not sophisticated enough to make an adequate showing of futility or ineffectiveness. Turnes, *supra,* at 643.

4. The statute provides for a continuance not to exceed 90 days to permit administrative remedies to be exhausted, rather than providing for dismissal for failure to exhaust. This provision constitutes a powerful safeguard against purposeful or negligent delay in administrative proceedings and confirms the court's continuing responsibility even where it has determined that administrative exhaustion should be required. This stay provision is also more realistic and fair to indigent *pro se* prisoners with limited sophistication and resources than a rule requiring dismissal without prejudice and subsequent refiling. Even under the relaxed scrutiny given to prisoners' *pro se* petitions and under the liberal provisions for *in forma pauperis* proceedings in the federal courts, *Hughes v. Rowe,* ____ U.S. ____, 49 U.S.L.W. 3346 (November 20, 1980); *Haines* v. *Kerner,* 404 U.S. 519 (1972), many prisoners have great practical and/or economic difficulty in preparing and mailing acceptable legal papers, and particularly in submitting a sufficient number of legible copies. Thus a requirement of refiling the action after resort to the administrative process is unduly and unnecessarily burdensome to prisoner-plaintiffs. See *Turner, supra,* at 642-43 and 646.

C. **Conflicts Between the Act and the Seventh Circuit Role**

In construing § 1983 and related statutes the Court must give effect to the purposes of Congress.[7] *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979); *Allen* v. *McCurry* _____ *US* _____, 49 U.S.L.W. 4015. When Congress amends a statutory scheme, as it has done in the Civil Rights of Institutionalized Persons Act, it must be assumed that it does so with care, and that what is says is what it means. *Palmore* v. *United States,* 411 U.S. 489, 395 (1973). And in the construction of any statute, the Court must be guided by the ancient maxim *expressio unisus est exclusio alterius,* see *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 543, 458 (1974), and its more contemporary rendering, that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States,* 278 U.S. 282, 289 (1929).

Accordingly, the carefully tailored exhaustion requirement of the Act must prevail over judicially created alternatives. Because the Seventh Circuit's exhaustion requirement differs in important respects from the Act (and more closely resembles earlier rejected versions of the statute) it cannot stand. These important differences between the Act and the *Secret* requirements are as follows:

1. There is no requirement in *Secret* that the exhaustion requirement be limited to grievance procedures which conform to the Attorney General's minimum standards. This

[7]The Seventh Circuit acknowledged as much in promulgating its exhaustion requirement: "The present matter being one of judicial construction of legislative intent, we are not persuaded that the result we here reach does violence to that intent." *Secret* v. *Brierton,* 584 F.2d at 831. The Court reached that conclusion however, before passage of *the new administrative exhaustion requirement in* § 1997e.

linkage is essential to the newly created Congressional scheme, and a judicial rule that departs must be rejected.

2. *Secret* requires dismissal without prejudice for failure to exhaust remedies, rather than a stay pending exhaustion.

3. The Act provides an overall 90-day time limit during which an action may be stayed for administrative exhaustion, and minimum standards to be promulgated by the Attorney General are required to provide "specific maximum time limits for written replies. . . at each decision level. . . ." By contrast, *Secret* requires only that procedures be "capable of providing [the] remedy within a reasonable time. . . ." 584 F.2d at 831. The absence of a specific and unambiguous time limit invites both dilatory conduct on the part of prison officials and pointless collateral litigation over what is "reasonable." The administrative scheme approved in *Secret* contains a rigorous time limit for the initial in-house stages but provides no time limit for the appeal to the Director of Corrections, for the Director's reference to the Administrative Review Board, or for the Board's response to the Director. 584 F.2d 832. Moreover, *Secret* is keyed to what the procedures are "capable of providing", not to what they actually provide, so a petitioner whose administrative claim is unduly delayed has no guidance as to the point at which he or she can stop waiting for Godot and file (or refile) suit under § 1983. By contrast, the Act's 90-day stay provision sets an unambiguous limit on administrative delay, after which the action is automatically restored to the district court's active docket.

4. The minimum standards to be promulgated by the Attorney General must provide "an advisory role for employees and inmates. . . in the formulation, implementation, and operation of the system. . . ." *Secret* has no

such requirement, and the Illinois procedure provide no role for inmates.

5. Under the Act, the minimum standards must provide "written replies with reasons thereto at each decision level." There is no such requirement in *Secret*, and the procedures approved in *Secret*, while requiring written findings at the facility level, do not require that the inmate be informed of anything but the result. If the prisoner appeals, the Director may find the grievance to be without merit without stating any reasons; if the Director refers the matter to an Administrative Review Board, the Board is to file findings and recommendations with the Director, but the inmate is not required to be given any reasons for the Director's final determination.

In summary, the Seventh Circuit's exhaustion requirement is inconsistent in significant respects with the requirement set forth in the Civil Rights of Institutionalized Persons Act. Since the imposition of an exhaustion requirement on a statutory remedy is an act of statutory construction, and since Congress has now spoken authoritatively as to its views on exhaustion under § 1983, any contrary judicial construction is void. Accordingly, the dismissal of the petitioner's complaint must be reversed.

D. Disposition of Petitioner's Claim

Because the Civil Rights of Institutionalized Persons Act does not authorize the courts to require administrative exhaustion on the present facts, Mr. Jenkins' claim should be remanded to the district court for a determination of the merits.

It is axiomatic that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or

legislative history to the contrary." *Bradley* v. *School Board of Richmond,* 416 U.S. 696, 711 (1974); *accord, Cort* v. *Ash,* 422 U.S. 66, 76-77 (1975); *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 164-65 (1975); *Fusari* v. *Steinberg,* 419 U.S. 379, 387 (1975) and cases cited. ". . . [E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley,* 416 U.S. at 715. As previously noted, there is no "statutory direction or legislative history to the contrary" here. Certainly, there can be no "manifest injustice" in proceeding to judgment without administrative exhaustion, under circumstances where Congress would not require exhaustion. This is not a change in the substantive law affecting vested rights and presents none of the equitable and constitutional problems associated with such situations. *Compare Denver and Rio Grande Western Railroad Co.* v. *Brotherhood of Railroad Trainmen,* 387 U.S. 556, 563 (1967) (amended venue statute applied); *United States* v. *Alabama,* 362 U.S. 602, 604 (1960) (amended jurisdictional statute applied); *with Greene* v. *United States,* 375 U.S. 149 (1964) (amended regulation restricting monetary restitution for wrongful loss of earnings not applied where claim accrued before amendment). "No one has a vested right in any given mode of procedure," *Crane* v. *Hahlo,* 238 U.S. 142, 147 (1922), especially where the "mode of procedure"—administrative exhaustion under the *Secret* holding—is a judicial gloss on a statute, unauthorized by the legislature and concededly unsupported by this Court's prior decisions.[8] Whether one

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[8]As noted previously, the only reference to legislative intent in *Secret* v. *Brierton* is in connection with the exhaustion requirement of habeas corpus, which this Court distinguished in *Preiser* v. *Rodriguez,* 411 U.S. at 492 n.10. The *Secret* cour explicitly conceded the lack of support for its holding in the prior decisions of this Court. 584 F.2d at 828.

chooses to view the Act in this context as a governing statute to be applied directly or as one of several pieces of evidence that an administrative exhaustion requirement was not previously intended,[9] the results is the same: administrative exhaustion may be required only on the terms prescribed by the Act, terms which are not met by the District Court's action.

Although the Act was passed a few days before the argument in the Court of Appeals, it is not mentioned in that Court's opinion and it appears that neither the court nor the parties were aware of it. However, there is no need to remand to the Court of Appeals for a determination of the Act's relevance. Its effect is clear. The plain requirements of the Act have not been met by the District Court's disposition of this case, and the Illinois procedure approved by the Seventh Circuit in *Secret* v. *Brierton* is also in conflict with the plain requirements of the Act. Since there is no possible construction of the Act that would require, or permit the District Court to require, further resort to the Illinois administrative scheme, there is nothing for the Court of Appeals to decide[10] and the case should be remanded to the District Court for decision on the merits. See *Denver and Rio Grande Western Railroad Co.*, 387 U.S. at 563; *United States* v. *Alabama*, 362 U.S. at 604.

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[9]See *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. at 164-65 (legislative history of amended statute evidenced disapproval of prior case law).

[10]For the same reason, the Court need not reach the petitioner's argument that further administrative exhaustion would be futile in this case.

CONCLUSION

For the reasons set forth above, the judgments below should be reversed and the cause remanded to the District Court for a determination of the merits.

Respectfully submitted,

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